No. 80-313

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CHARLES SUTTON,

Appellant,

v.

JOINT BAR ASSOCIATION GRIEVANCE COMMITTEE FOR THE SECOND AND ELEVENTH JUDICIAL DISTRICTS,

Respondent.

On Appeal from the Court of Appeals of the State of New York

and

On Appeal from the Appellate Division, Second Department of the Supreme Court of the State of New York

---

MOTION TO DISMISS APPEAL

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Preliminary Statement

Respondent, Joint Bar Association Grievance Committee for the Second and Eleventh Judicial Districts' motion is submitted to dismiss the appeal of appellant, Charles Sutton, purportedly taken pursuant to 28 USC §1257(2), for want of a substantial federal question.

Appellant served his jurisdictional statement on repondent on August 29, 1980.

The appeal which involves an attorney disciplinary proceeding, was taken from an order of the Appellate Division, Second Department of the Supreme Court of the State of New York, dated and entered November 13, 1979, which suspended appellant from the practice of law for three years (*Matter of Sutton,* 70 AD 2d 467 [1979 2nd Dept.]) and from the orders of the Court of Appeals of the State of New York, dated and entered February 7, 1980, dismissing his appeal, *Matter of Sutton,* 49 N.Y. 2d 799 and the order dated and entered April 1, 1980, *Matter of Sutton,* 49 N.Y. 2d 918, denying reargument and leave to appeal and the order dated and entered May 29, 1980, denying reargument of the motion for leave to appeal. *Matter of Sutton,* —— N.Y. 2d ——.

Jurisdiction

This motion to dismiss is brought in accordance with Rule 16(b) of the U. S. Supreme Court Rules (28 USCA, Supreme Court Rules, Rule 16(b).

Statement of the Case

Appellant, Charles Sutton was admitted to practice as an attorney and counsellor-at-law, by the Appellate Division, Second Department of the Supreme Court of the State of New York in 1952. By order of the latter court, dated and filed on April 25, 1977, respondent, Joint Bar Association Grievance Committee for the Second and Eleventh Judicial Districts was authorized to prosecute a disciplinary proceeding against appellant, Charles Sutton.

After lengthy hearings, in which appellant, Charles Sutton and his counsel each took turns cross-examining and re-cross examining respondent's witnesses, the referee rendered his report. (See Appellant's Jurisdictional Statement, page 2a)

The referee had sustained in full the first of two charges of professional misconduct and the second charge, in part. The Appellate Division, Second Department (*Matter of Sutton,* 70 AD 2d 467 [1979, 2nd Dept.]) agreed in full with the referee. The Court found in suspending appellant from the practice of law for three years, that appellant had been ". . . guilty of converting to his own use, escrow funds in the amount of $1,500 from the proposed purchasers of real property without the knowledge or consent of the purchaser's attorney and neglecting a legal matter for which he had been retained, resulting in prejudice to his clients."

The referee had found in his report, which as noted above was fully sustained by the Appellate Division, the following:

Fifteen hundred dollars ($1,500) was to have been held in escrow by appellant until closing pursuant to the terms of a contract (which was marked in evidence at the hearings) entered into between the seller, Plover Builders,

Inc. and the purchasers, Rocco and Mary Santora, for the purpose of a one family house for the price of $25,500. The contract was executed on June 25, 1971.

Appellant was the sole shareholder of Plover Builders, Inc. and executed the contract on its behalf. In addition, it was undisputed that appellant acted as the attorney for the seller and at the time of contract signing, June 25, 1971, received a check in the amount of $1,500. from the purchasers for the down payment. The purchasers were represented by counsel, Marvin Korobow, Esq. at the contract signing.

The escrow check bore the legend on it, "In escrow in re premises 30 Violet Road . . .". Further, the check was made payable to the order of appellant, "as attorney".

Appellant on or about June 29, 1971 called Mrs. Mary Santora at her home and falsely advised her that her attorney had agreed to the issuance of a substitute check, telling her that he needed a certified check. Appellant then picked Mrs. Santora up at her home and took her to her bank and had her issue him a second check which he promptly cashed. Further, he instructed Mrs. Santora not to put the words "in escrow" on the check, telling her that it was unnecessary to do so. Mrs. Santora testified that she had assumed that the money was kept in escrow by appellant.

The $1,500. which was thereby converted, was never returned to the Santoras, appellant claiming that the purchasers breached the contract. The alleged breach centered around a claim by appellant that the purchasers were to procure a mortgage pursuant to a contingency provision in the contract. However, five witnesses at the hearing, namely Mr. & Mrs. Santora, their attorney and

two real estate brokers, all testified that it was appellant who was to obtain the mortgage for the purchasers. The alleged breach of contract claimed by appellant, had occurred subsequent to the switch of the checks and therefore in fact bore no relationship to appellant's conversion of the $1,500. escrow.

In any event, a civil lawsuit instituted by appellant against the Santoras at the time hearings were held by the Grievance Committee of the Brooklyn Bar Association in 1973 regarding his conduct was thereafter not pursued by him until the hearings authorized by the Appellate Division were conducted in 1978. In that action summary judgment was granted by the Supreme Court of the State of New York, Kings County in 1978 in favor of the Santoras against appellant.

The referee found in effect that appellant testified falsely when he denied under oath that he was to procure the mortgage.

Regarding Charge Two, the Zolondek Matter, the referee found that appellant had been retained by Mrs. Zolondek on behalf of her son who at six years of age was injured in or about 1957 when he fell off a mechanical hobby horse. Appellant caused process to be served in 1960. In 1964 the matter was placed on the calendar. In 1965, the case wase marked off the calendar pursuant to Rule 3404 of the Civil Practice Law and Rules of New York (Vol. 7B, McKinneys) as having been abandoned.

Appellant had told his client, Mrs. Zolondek between 1964 and 1972 in conversations they had, that the case was on the calendar.

The referee found that appellant not only neglected the case, prejudicing his client's right to revive the action if

she chose to, but misrepresented that the case was still on the calendar.

As to the De Loach matter, the referee did not sustain the charge.

POINT ONE

The appeal should be dismissed, in view of appellant's failure to establish that a substantial federal question exists.

Appellant predicates the instant appeal on the alleged unconstitutional application to him of Rule 691.4 of the Rules Governing the Conduct of Attorneys of the Appellate Division, Second Department of the Supreme Court of the State of New York, (22 NYCRR 691.4).

Rule 691.4 provides as follows:

> "691.4 Appointment of Grievance Committees; Commencement of Investigation of Attorney Misconduct; Complaints; Procedure
>
> (a) This court shall appoint three grievance committees for the Second Judicial Department. One of these grievance committees shall be charged with the duty and power to investigate and prosecute matters arising in or concerning attorneys practicing, or currently residing or having resided in the second and eleventh judicial districts at the time of their admission to practice by the Appellate Division; another shall have the duty and power to investigate and prosecute matters arising in or concerning attorneys practicing, or currently residing or having resided in the ninth judicial district at the time of their admission to practice by the Appel-

late Division; and the third shall have the duty and power to investigate and prosecute matters arising in or concerning attorneys practicing, or currently residing or having resided in the tenth judicial district at the time of their admission to practice by the Appellate Division. These committees shall also have the power and duty to investigate and prosecute matters concerning attorneys to whom this Part applies pursuant to section 691.1 of this Part.

(b)(1) Each grievance committee shall consist of nineteen members and a chairman, all of whom shall be appointed by this court and sixteen of whom shall be attorneys. The chairman shall have the power to appoint an acting chairman from among the members of the grievance committee. Appointments of attorney members may be made from lists of prospective members submitted by the following county bar associations within the second judicial department; Brooklyn Bar Association, Dutchess County Bar Association, Bar Association of Nassau County, New York, Inc., Orange County Bar Association, Putnam County Bar Association, Queens County Bar Association, Richmond County Bar Association and Westchester County Bar Association. This court shall, in consultation with the committees, appoint a chief counsel to each such grievance committee and such assistant counsel and supporting staff as it deems necessary.

(2) Five persons shall be appointed to each such committee for a term of one year, five persons for a term of two years, five persons for a term of three years and five persons for a term of four years. No person who has served two consecutive terms shall be eligible for reappointment until the passage of one year from the expiration of his second such term.

(3) The members of the joint bar associaton grievance committees, as volunteers, are expressly authorized to participate in a state-sponsored volunteer program within the meaning of subdivision 1 of section 17 of the Public Officers Law.

(c) Investigation of professional misconduct, may be commenced upon receipt of a specific complaint by this court or by any such committee, or such investigation may be commenced sua sponte by this court or such a committee. Complaints must be in writing and signed by the complainant but need not be verified. Complainants shall be notified by the committee of actions taken by it with respect thereto.

(d) Each grievance committee shall have the power to appoint its members to subcommittees of not less than three members, two of whom shall constitute a quorum and shall have power to act. At least two members of a subcommittee shall be attorneys. The chairman of the committee shall designate a member of the subcommittee to act as its chairman. Such subcommittees may hold hearings as hereinafter authorized.

(e) Upon receipt or initiation of a specific complaint of professional misconduct, any such committee may, after preliminary investigation and upon a majority vote of the full committee:

(1) dismiss the complaint and so advise the complainant and the attorney;

(2) conclude the matter by issuing a letter of caution to the attorney and by appropriately advising the complainant of such action;

(3) conclude the matter by privately admonishing attorney, which admonition shall clearly indicate the improper conduct found and the disciplinary rule, canon or special rule which has been violated, and by appropriately advising the complainant of such action;

(4) *serve written charges upon the attorney and hold a hearing on the matter as set forth in subdivsion (f) of this section;*

(5) *forthwith recommend to this court the institution of a disciplinary proceeding where the public interest demands prompt action and where the available facts shows probable cause for such action.* (Emphasis Supplied)

(f) Except as otherwise provided for in paragraph (5) of subdivision (e) of this section, if, after preliminary investigation, the committee shall deem a matter of sufficient importance, written charges predicated thereon, plainly stating the matter or matters charged, together with a notice of not less than twenty days shall be served upon the person concerned, either personally, by certified mail, or, in such other manner as the committee may direct. The person so served shall file a written answer at the time and place designated in the notice and the committee or a subcommittee shall proceed to hold a hearing of the case. The person concerned (hereinafter referred to as the respondent) may be represented and assisted by counsel. The committee or subcommittee shall decide all questions of evidence. Stenograpic minutes of the hearing shall be kept.

(g) Whenever in the course of a hearing evidence is presented upon which another charge or charges

against the respondent might be made, it shall not be necessary for the committee to prepare and serve an additional charge or charges on the respondent, but the committee or the subcommittee may, after reasonable notice to the respondent and an opportunity to answer and be heard, proceed to the consideration of such additional charge or charges as if the same had been made and served at the time of the service of the original charge or charges.

(h) If the hearing was held before a subcommittee, it shall make findings of fact and report those findings to the committee. Upon the completion of a hearing the committee shall promptly meet and either dismiss or sustain the charges and, as to any charges sustained, shall either issue a letter of caution, admonish the respondent or recommend that probable cause exists for the filing of disciplinary charges against the rsepondent in this court. A letter of caution may also be issued where the charges have been dismissed. The approval of a recommendation of the filing of disciplinary charges in this court shall be by a majority vote of the full committee.

(i) In the event that a minority of the committee disagrees with a final determination, such minority report shall be filed with this court along with any majority report and the written report of the subcommittee. Upon such filing the committee shall await the determination of this court before otherwise disposing of the matter.

(j) Unless otherwise provided for by this court, all proceedings conducted by a grievance committee shall be sealed and be deemed private and confidential.

(k) Disciplinary proceedings shall be granted a preference by this court."

Appellant's claim is that he was not accorded a subcommittee hearing as required by the aforesaid Rule 691.4 (e)(4) and therefore suffered a deprivation of due process.

However, he has failed to point out, that in addition to the extensive hearings conducted before the referee, lengthy hearings were held by the Grievance Committee of the Brooklyn Bar Association on December 20, 1972, January 17, 1973, February 21, 1973, March 21, 1973 and May 16, 1973, regarding *inter alia,* the *Santora* complaint (Charge One of the petition referred to *supra*). At those hearings, appellant for a time appeared with counsel and then *pro se,* cross-examined witnesses and then testified on his own behalf.

The Brooklyn Bar Association hearings were conducted prior to the promulgation of the Appellate Division, Second Department of the Supreme Court of the State of New York's Rules Governing the Conduct of Attorneys, Part 691, which was put into effect in November 1974. Indeed, therefore the respondent Joint Bar Association Grievance Committee for the Second and Eleventh Judicial Districts did not even come into existence (22 NYCRR 691.4) until the latter rules were enacted and subsequent to when the Brooklyn Bar Association conducted its hearings.

Part 691 gives local bar association grievance committees authority to continue the handling of complaints of professional misconduct which are "minor matters", however, the bar association grievance committees are required to forward serious matters to the Joint bar Asso-

ciation Grievance Committee (now known as the Grievance Committee for the Second and Eleventh Judicial Districts) which is an arm of the court. This division of duties of the local bar association is prescribed by §691.1 (b) of the aforesaid Rules Governing the Conduct of Attorneys.

> "PART 691—RULES GOVERNING THE CONDUCT OF ATTORNEYS
>
> §691.1 Application
>
> (a) This Part shall apply to all attorneys who are admitted to practice, reside in, commit acts in or who have offices in the second judicial department, or who are admitted to practice by a court of another jurisdiction and who regularly practice within this department as counsel for governmental agencies or a house counsel to corporations or other entities, or otherwise. In addition, any attorney from another State, territory, district or foreign country admitted pro hac vice to participate in the trial or argument of a particular cause in any court in the second judicial department, or who in any way participates in an action or proceeding therein, shall be subject to this Part.
>
> (b) The imposition of discipline pursuant to this Part shall not preclude the imposition of any further or additional sanctions prescribed or authorized by law, and nothing contained in this Part shall be construed to deny to any other court such powers as are necessary for that court to maintain control over proceedings conducted before it, such as the power of contempt, *nor to prohibit bar associations from censuring, suspending or expelling*

> *their members from membership in the association or from admonishing attorneys in minor matters:* provided, however, that such action by a bar association shall be reported to the appropriate committee appointed pursuant to section 691.4 (a) of this Part and provided further, that such action by a bar association shall not be a bar to the taking of other and different disciplinary action by this court or by a committee appointed pursuant to section 691.4(a) of this Part." (Emphasis Supplied)

Accordingly, this serious matter which involved an allegation of conversion of escrow funds (Santora matter) was forwarded by the Brooklyn Bar Association to the Joint Bar Association Grievance Committee Second and Eleventh Judicial Districts in or about 1975. Appellant was therefore given the equivalent of a subcommittee hearing, (§691.4 (e)(4)) prior to the effective date of Part 691 as well as the hearing before the referee.

The subcommittee hearing is used by the Joint Bar Association Grievance Committee as an investigatory tool. Thus, his claim of a denial of due process is absurd and the appeal should be dismissed for want of a substantial federal question. *Friedman* v. *Court on Judiciary of the State of New York,* 375 U.S. 10 (1963).

The prompt action provision under §691.4 (e)(5) (*supra*) serves the purpose of avoiding additional delay in the conduct of the disciplinary proceeding where the public interest demands that expeditiousness is required and probable cause exists, such as where there is an allegation that escrow funds have been converted. Therefore, in those instances one hearing is conducted before a referee rather than holding an additional investigatory subcommittee

hearing before the Joint Bar Association Grievance Committee.

Finally, Part 691 is not a statute but merely a rule of the Appellate Division. Section 1257(2) (28 USCA) on which appellant bases his appeal, requires that the validity of a statute be called into question, not the mere rule of a Court.

POINT TWO

Appellant has raised collateral issues which are also lacking in merit.

He alludes to *Addington* v. *Texas,* —— U.S. —— 99 S.Ct. 1804 (1979) for the purported proposition that a higher quantum of proof than a fair preponderance of the evidence should have been applied in his attorney disciplinary proceeding. *Addington,* decided by this Court, has little if any relevance to attorney disciplinary proceedings, since it involved a civil involuntary commitment proceeding in which this Court held that a clear and convincing standard must be applied.

This Court specifically stated in *Addington,* that,

> "We have concluded that the reasonable doubt standard is inappropriate in civil commitment proceedings because, given the uncertainties of psychiatric diagnosis, it may impose a burden the state cannot meet and thereby erect an unreasonable barrier to needed medical treatment. Similarly, we conclude that use of the term 'unequivocal' is not constitutionally required although the states are free to use that standard. To meet due process demands, *the standard has to inform the fact finder that the proof must be greater than the preponderance of the*

evidence standard applicable to other categories of civil cases." (Emphasis Supplied)

It has long been held in New York, that attorney disciplinary proceedings are civil in nature and not criminal or quasi-criminal. *Matter of Zuckerman,* 20 N.Y. 2d 430, 438 (1967), *cert. den.* 390 U.S. 925 (1968) See also, *Matter of Anonymous,* 41 N.Y. 2d 506 (1977) and *Matter of Randel,* 158 N.Y. 216 (1899).

Additionally, the standard of proof in disciplinary proceedings in New York is as described above, by a fair preponderance of the credible evidence. *Matter of Phillies,* 17 A.D. 2d 93, 99 (4th Dept., 1962) *Mtn for lv. to app. to Ct. of App. den.* 12 N.Y. 2d 645, *Matter of Feola,* 37 A.D. 2d 789 (3rd Dept., 1971) and *Matter of Mogel,* 18 A.D. 2d 203, 204 (1st Dept., 1963).

The record as described in the Statement of the Case above, reflects that the evidence adduced at the hearings was more than sufficient basis on which the charges were sustained, contrary to appellant's contention.

Concerning the Zolondek matter, the referee's finding that appellant had not only been guilty of neglect but misrepresentation, clearly does not amount to a deprivation of due process, since it wasn't only charged in the petition that appellant neglected the interests of his client, but that he permitted the case to be marked off the calendar and despite numerous calls from his client and meetings with her in which she inquired into the status of the case, he failed to apprise her that the case had been dismissed.

The specific allegation in the petition provided,

"Charge Two

B. Respondent has been guilty of neglecting legal matters entrusted to him and of failing to respond to the legitimate inquires of his clients as follows:

1. Respondent was retained by William and Florence Zolondek in or about 1957 to prosecute an action for personal injuries sustained in a fall by their son, Martin Zolondek who was six years of age at the time of the accident which occurred on April 19, 1957.

An action was commenced by the respondent on behalf of the Zolondeks in Supreme Court, Kings County. Issue was joined on August 7, 1961. A note of issue was filed by the respondent on July 6, 1964 with the Supreme Court of the State of New York, Kings County. Thereafter:

(a) Respondent grossly neglected the interests of his clients in that he permitted the case to be marked off the calendar and dismissed;

(b) *Despite numerous calls and meetings at which the Zolondeks appeared at respondent's office, and inquired as to the status of their lawsuit, he has failed to apprise his clients that the matter has been dismissed."* (Emphasis Supplied)

The finding of misrepresentation therefore was implicit in the charge, even though that specific word was not used. Thus, appellant's claim is meritless.

CONCLUSION

The alleged jurisdictional basis for this appeal pursuant to §1257(2) (28 USCA 1257 (2)) has not been established in the case at bar, since a substantial federal question does not exist. Further, Section 691.4 (e) of the Rules Governing the Conduct of Attorneys of the Appellate Division Second Department (22 NYCRR 691.4 (e)) is just that, a rule and not a statute as described in §1257 (2). Moreover, the other collateral claims by appellant, in which he does not assert jurisdiction for this appeal, are without basis.

Hence, the appeal should be dismissed.

Dated: Brooklyn, New York
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